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No. 91-1328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," exempts from hazardous waste regulation the ash residue from the burning of municipal solid waste at such a facility.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as Mayor of the City of Chicago. The respondents are the Environmental Defense Fund, Inc., and Citizens for a Better Environment.

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BRIEF OF THE NATIONAL LEAGUE OF CITIES AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici curiae are organizations whose members include state, county and municipal governments and officials throughout the United States. The National League of Cities ("NLC") is a not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Almost 15,000 municipalities are members of and participate in the activities of the NLC. The National

Association of Counties ("NACo") is the only national organization representing county government in the United States. NACo represents over 1900 counties, and through them approximately 90% of the United States population. The members of NLC and NACo have a compelling interest in the legal issues pertaining to the incineration of municipal solid waste ("MSW") and the interpretation of the Clarification of Household Waste Exclusion found in Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).[1]

The Court has recognized in the past that sanitation is a traditional function of local government and that local government bears the financial burden of this responsibility.[2] Cities and counties around the country, faced with diminishing MSW landfill capacity, increasing landfill tipping fees and great difficulties in siting new landfills, have invested heavily in resource recovery and combustion systems to manage MSW. Thus, 176 MSW combustors, owned both by local governments and private companies, now handle 17% of the MSW generated in the United States. Because each of these facilities, including those privately owned, serves the MSW management needs of local governments, and because these facilities represent tremendous capital investments by local governments, *amici* and their members have a great financial stake in the outcome of this litigation. In addition to their financial interests in the issues presented in this case, *amici* have an interest in protecting municipal decisionmaking on local waste management issues. Because the Seventh Circuit's decision below will impose substantial additional costs on jurisdictions which oper-

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2.

[2] *See National League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (sanitation is "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services"); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 575 (1985) (Powell, J., dissenting).

ate resource recovery facilities, in many situations making further use of the facility economically infeasible, local autonomy over MSW management is imperilled.

SUMMARY OF ARGUMENT

Below, the Seventh Circuit concluded that the exemption from the hazardous waste regulatory regime which Congress extended to resource recovery facilities burning MSW under Section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i), *see* App. A, *infra*, did not include the ash produced from burning MSW. Not only is this decision inconsistent with the language of Section 3001(i) and its legislative history, but the consequence of the decision will defeat the very purpose for which Congress adopted the exemption.

Starting with the enactment of RCRA in 1976, and through two sets of amendments in 1980 and 1984, Congress sought to keep the management of MSW separate and apart from the regulatory regime relating to hazardous waste. Congress also sought to encourage local governments to burn MSW at resource recovery facilities to promote the generation of energy and to save scarce landfill space. To that end, Congress in 1984 adopted Section 3001(i), which expressly exempts all operations of MSW resource recovery facilities from RCRA's hazardous waste regulatory program.

If the Seventh Circuit's decision is not reversed, there will be a substantial disincentive for local governments to use resource recovery facilities to handle their MSW. From an economic standpoint, it is simply cheaper for many local governments to dispose of untreated MSW in a sanitary landfill than to burn the same material in a resource recovery facility and dispose of the ash in a hazardous waste landfill. If the Seventh Circuit's decision stands, local governments will be obliged by economic considerations to choose landfilling of untreated MSW over the use of resource recovery facilities, very few new resource recovery facilities will be built, and the limited

space available for landfilling will be more quickly exhausted. Thus, the Seventh Circuit's interpretation of Section 3001(i) defeats the statute's overriding purpose.

Currently, there is a conflict between the Seventh Circuit's decision in this case and the decision of the Second Circuit in *Environmental Defense Fund, Inc.* v. *Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir. 1991), *aff'g* 725 F. Supp. 758 (S.D.N.Y. 1989), *cert. denied*, 112 S. Ct. 453 (1991), which held that the ash from a resource recovery facility is covered by the exemption in Section 3001(i). Because of the conflict, local governments outside of the Second and Seventh Circuits are faced with uncertainty about the legal requirements which relate to their handling of the ash. The uncertainty interferes with their ability to formulate plans for handling MSW in a lawful, but cost-effective manner, discourages investments in new resource recovery facilities, and exposes cities and counties to lawsuits.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. THE SEVENTH CIRCUIT'S HOLDING WILL EXACERBATE THE CURRENT SHORTAGE OF LANDFILL SPACE, MAKE UNCERTAIN THE ECONOMIC VIABILITY OF RESOURCE RECOVERY FACILITIES, AND IMPOSE SIGNIFICANT COSTS ON LOCAL GOVERNMENTS

A. Resource Recovery Is An Important Aspect of MSW Management

This country faces a significant landfill crisis. While there were approximately 10,000 operating MSW landfills in 1970, only approximately 6,500 remained in operation by 1988.[3] Many of these will be forced to close as a con-

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[3] 56 Fed. Reg. 50,978, 50,988 (Oct. 9, 1991); U.S. Environmental Protection Agency, *EPA/530-SW-88-011A, Report to Congress, Solid Waste Disposal in the United States, Executive Summary* at 1 (Oct. 1988).

sequence of regulations promulgated by the Environmental Protection Agency ("EPA") in 1991.[4] As rapidly as landfill capacity has decreased, tipping fees at remaining MSW landfills have increased. Between 1988 and 1990 average tipping fees increased 17% nationally.[5] Moreover, the landfill crisis is compounded by severe regional capacity shortages, prompting many cities and counties to ship MSW to distant jurisdictions or across state lines and thereby adding significant transportation costs as well as disposal surcharges. For instance, a 1989 study reported that 11 New Jersey counties shipped their MSW out of state and that over half the state's refuse was sent to other regions of the country.[6]

Incineration has played a significant role in MSW disposal. In 1938, approximately 600 to 700 cities and towns burned their garbage and rubbish.[7] However, use of incineration waned as landfilling became more economical, and by 1974 only 160 incinerators and resource recovery facilities were in operation.[8] Today, resource recovery facilities and incinerators have again become a vital part of the MSW management system. They are increasingly important and popular due to the shortage and expense of landfill space. Incineration reduces pressure on landfill capacity by reducing the volume of MSW by up to 90% and the mass by approximately 75%.[9] Jurisdictions which burn portions of their MSW streams and then

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[4] *See* 56 Fed. Reg. at 50,992.

[5] National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6 (1991). In the midwest and the mid-Atlantic regions of the country, fees increased by 31% and 20%, respectively.

[6] National Solid Wastes Management Association, *Landfill Capacity in the Year 2000*, at 5 (1989).

[7] Martin V. Melosi, *Garbage in the Cities* 217 (1981).

[8] *Id.*

[9] Homer A. Neal & J.R. Schubel, *Solid Waste Management and the Environment, the Mounting Garbage and Trash Crisis* 117 (1987).

landfill the remaining ash reduce landfill tipping fees and transportation costs significantly. In 1991, 176 resource recovery facilities and incinerators burned more than 31 million tons of MSW, or 17% of the nation's total MSW stream.[10] If the 68 projects currently in planning and construction stages are completed, capacity will be increased to 53 million tons per year, or 24% of the estimated total volume of MSW that will be generated in the year 2000.[11]

In addition to saving landfill space, resource recovery facilities provide substantial other environmental and economic benefits. One ton of MSW burned in a resource recovery plant provides enough energy to light one thousand 100-watt light bulbs for one hour, power 500 hair dryers for one hour, or furnish electricity to an ordinary apartment for one month.[12] A portion of the energy generated by resource recovery facilities is used to operate the plants themselves, making the facilities self-sufficient, and the remainder is sold and the proceeds applied to the facility's operating expenses, further reducing the cost of MSW disposal to local government.

B. Classifying MSW Ash as a Subtitle C Waste Will Create a Disincentive to Resource Recovery

If MSW ash is reclassified as a hazardous waste, resource recovery facility operators will be required to dispose of that ash only at landfills which have obtained applicable state or federal treatment, storage and disposal permits under the strict requirements of Subtitle C of RCRA. 42 U.S.C. §§ 6924, 6925. As a consequence of the stricter environmental control requirements and the added risk of liability inherent in handling hazardous

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[10] Jonathan V.L. Kiser, *Municipal Waste Combustion in the United States: An Overview*, Waste Age, Nov. 1991, at 27.

[11] *Id.*

[12] Neal & Schubel, *supra* note 9, at 108.

wastes, the cost of disposing of MSW ash in a hazardous waste landfill will be substantially greater than the cost of putting the ash in MSW landfills or in ash monofills. For example, Hennepin County, Minnesota, estimates the cost of disposing MSW ash as a hazardous waste to be $150 to $200 per ton. This figure is three to four times the $50 per ton which the county pays for ash disposal in a MSW landfill or monofill. Moreover, the cost is approximately six to seven times the national average for tipping fees at MSW landfills, which is $26.56 per ton.[13] Furthermore, if all the MSW ash currently produced is diverted to hazardous waste landfills, hazardous waste landfill charges will likely increase significantly due to the added demand for space. Thus, the nation's limited hazardous waste landfill capacity would be taxed substantially and shortages would result.

By increasing the cost of ash disposal so dramatically, the Seventh Circuit's ruling below will create a significant economic disincentive to resource recovery. For instance, the City of Akron, Ohio, estimates the following: the cost of landfilling one ton of MSW is $50; the cost of incincerating one ton of MSW and landfilling the ash in a MSW landfill is $57; and the cost of incinerating one ton of MSW and disposing of the ash in a hazardous waste landfill is $92. Thus, for Akron, it would cost almost twice as much to burn a ton of MSW and take the residue to a hazardous waste landfill than to simply dispose of the untreated MSW in a sanitary landfill. Similarly, Montgomery County, Ohio, estimates that incinerating MSW and disposing of the ash as a hazardous waste would be approximately three times as costly as disposing uncombusted MSW in a MSW landfill in the first place.

Likewise, New York City, which incinerates over 1 million tons of MSW annually, estimates that its cost per ton would increase from approximately $100 to over $300

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[13] National Solid Wastes Management Association, *1990 Landfill Tipping Fee Survey* 6 (1991).

if the ash is designated as hazardous. This would increase New York's MSW disposal costs by over $200 million per year. By way of comparison, the cost of diverting the MSW waste stream directly to a MSW landfill without any incineration is only $30 per ton.[14] For Marion County, Oregon, landfilling MSW ash as a hazardous waste would almost double the cost of MSW disposal, raising it from the current cost of $46.95 per ton to $80.10 per ton. This can be compared with costs of $36 per ton to send MSW directly to a landfill without incinerating it.

As the examples above show, requiring that MSW ash be treated as a hazardous waste will make the incineration process economically infeasible in many communities and may result in disposal of all the MSW generated by these communities in sanitary landfills. Consequently, MSW landfill capacity will begin to diminish at an even faster rate and tipping fees will increase accordingly. Thus, pure economics would force many cities and counties to choose landfilling of MSW over resource recovery, if the ash residue had to be handled as a hazardous waste.

As a result of the economic disincentives created by the Seventh Circuit's decision, resource recovery will cease to be a viable option for many communities. Moreover, facilities in the planning or construction stage may be canceled and the future viability of existing facilities will be jeopardized. The 57 plants currently in the planning or construction stages represent enormous development costs[15] to both local governments and private own-

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[14] This figure, however, is far below market rates because New York owns and operates its own landfill. Furthermore, the $30 per ton figure does not include the cost of new landfill construction to compensate for lost capacity.

[15] In 1985, the cost of construction of a resource recovery facility capable of processing 1000 tons of MSW per day was $80 million. Neal & Schubel, *supra* note 9, at 117.

ers throughout the country who have relied on the RCRA's statutory goal of encouraging resource recovery and the explicit exemption of MSW resource recovery facilities from Subtitle C regulation provided by Congress in Section 3001(i).[16] Importantly, the Seventh Circuit's decision also results in geographical inequities by making MSW management far more expensive for cities and counties in Illinois, Indiana, and Wisconsin than for local governments located in other circuits. To resolve this uncertainty and inequity, the Court should grant the petition for certiorari to determine a national rule which cities and counties can rely upon in making MSW planning decisions.

C. Requiring Treatment of MSW Ash as a Hazardous Waste Will Place Unnecessary Financial Burdens on Cities and Counties

The financial burden of providing sanitation and solid waste disposal services has been increasing substantially for local governments, as has the cost of providing other essential services. At the same time, the federal government has drastically decreased its role in providing financial support to local governments. For example, local governments received 9% of their revenues from the fed-

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[16] The jurisdictions with publicly owned resource recovery facilities in the advance planning or construction stages include: Lisbon, Connecticut; Delaware Solid Waste Authority plant, near Millsburg, Delaware; Lee County, Florida; Mid-Maine Waste AC, Auburn, Maine; Montgomery County, Maryland; Oakland County, Michigan; Dakota County, Minnesota; St. Louis, Missouri; Mercer County, New Jersey; Monmouth County, New Jersey; Morris County, New Jersey; Union County, New Jersey; Mecklenburg County, North Carolina; Montgomery County, Pennsylvania; Kingston, Rhode Island; Johnston, Rhode Island; and Nashville, Tennessee. *The 1991 Municipal Waste Combustion Guide*, Waste Age, Nov. 1991, at 27. Numerous other plants, planned and financed by private companies, will serve other local governments, which will pay tipping fees for MSW disposal at these facilities.

eral government in 1980, but only 4% in 1988.[17] Adjusted for inflation, the decline is even more notable.

A study conducted by the National League of Cities in the Spring of 1991 illustrates the financial plight of the cities. Almost 61% of the cities surveyed reported that 1991 general fund expenditures were expected to exceed revenues, and over 26% said that expenditures would exceed revenues by more than 5%.[18] The bankruptcy of the City of Bridgeport, Connecticut, is but one example of the desperate financial circumstances facing many cities.[19]

Further, 66.3% of the responding cities reported that the cost of solid waste disposal was one factor beyond their control contributing to fiscal difficulties.[20] Over 10% of cities reported that landfill, refuse, solid waste and recycling expenses comprise the single factor that most adversely affected city expenditures.[21]

The Seventh Circuit's ruling will significantly increase MSW management costs by compelling local governments to pay for disposal of MSW ash in expensive hazardous waste landfills or to pay, either directly or indirectly through higher tipping fees, for increased MSW landfill space. If obliged to spend more for solid waste disposal, local governments will be even more disadvantaged in furnishing other needed services to their constituents.

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[17] U.S. Department of Commerce, *Statistical Abstract of the United States 1991*, at 295.

[18] National League of Cities, *City Fiscal Conditions in 1991*, at iii (1991).

[19] *See* George Judson, *Anguished Plea from Bridgeport for Fiscal Relief*, N.Y. Times, June 8, 1991, at 1. It is interesting to note that Bridgeport invested substantially in a resource recovery facility which went on line in 1988.

[20] National League of Cities, *supra* note 18, at 31. Solid waste disposal costs ranked higher than changes in the amount of state aid to cities (59.2%) and employee pension costs (58.5%).

[21] *Id.* at 7.

Like solid waste disposal costs, necessary service costs have been rising faster than have revenues. For example, while city government revenues rose by 9.5% between 1988 and 1990, solid waste mangament costs rose by 12.5%.[22] Over the same period, health costs rose by 15.3%, police protection costs by 11.1%, corrections costs by 26.9%, and judicial and legal administration costs by 17.3%.[23]

II. THE SEVENTH CIRCUIT'S DECISION FRUSTRATES CONGRESS' GOAL OF ENCOURAGING RESOURCE RECOVERY

Congress consistently has sought to promote two objectives relating to the handling of MSW: (1) keeping the management of MSW separate and apart from RCRA's hazardous waste management regime, and (2) facilitating resource recovery as an option for managing MSW in order to save scarce landfill space and promote energy recovery. As described below, these two objectives have been articulated by Congress in its enactment of RCRA in 1976, as well as in subsequent amendments to RCRA in 1980 and 1984.

A. The Congressional Scheme Regulating MSW Resource Recovery Is Separate from the Regulation of Hazardous Wastes Under Subtitle C of RCRA

In enacting RCRA in 1976,[24] Congress unambiguously separated the handling of MSW from the scheme for managing hazardous wastes established under Subtitle C of RCRA. *See* S. Rep. No. 988, 94th Cong., 2d Sess. 15-16 (1976) (stating the hazardous waste permit program is "not a general regulatory program of municipal or

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[22] U.S. Department of Commerce, *City Government Finances 1989-90*, at 1 (summary).

[23] *Id.*

[24] Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992k).

private sanitary landfill operations. . . . [and] is not to be used . . . *to extend control over* general municipal wastes") (emphasis added).

Expressing concern over the increasing scarcity of land available to metropolitan areas due to landfilling of MSW, Congress further concluded that resource recovery facilities should be promoted as an alternative to landfilling and as an independent source of energy. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. *See also* Section 1002(b)(8) and (d) of RCRA, 42 U.S.C. § 6901(b)(8) and (d). To facilitate the development of MSW resource recovery, Congress authorized technical as well as research and development aid to localities developing resource recovery facilities under Subtitles B and D of RCRA. *See* Sections 2003 and 4008 of RCRA, 42 U.S.C. §§ 6913, 6948. Also, Congress authorized EPA to promulgate rules and guidelines to assist states in implementing resource recovery plans, and to specifically consider appropriate types of resource recovery facilities for a variety of state and municipal situations. *See* Section 4002(c)(10) of RCRA, 42 U.S.C. § 6942(c)(10).

Congress' intention to promote the incineration of MSW to produce energy as a primary means of resource recovery is reflected throughout the legislative history of RCRA's enactment. For example, House Report 1491 explains that Section 4003 of RCRA, 42 U.S.C. § 6943, allows state and local governments the flexibility needed to develop alternative disposal systems by "requir[ing] that the discarded materials be utilized by a resource recovery facility for the recovery of energy . . . or that such discarded materials be disposed of . . . by [an] environmentally sound method of disposal, *including incineration* that does not conflict with the Clean Air Act." H.R. Rep. No. 1491, at 78-79 (emphasis added).[25]

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[25] *See also* H.R. Rep. No. 1491, at 88-89, *reprinted in* 1976 U.S.C.C.A.N. 6324 (detailing the composition of the MSW stream, and comparing the energy yields from incineration of MSW and

Four years after the passage of RCRA, Congress reaffirmed its objective of promoting the development of resource recovery facilities by enacting Section 32 of the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (hereinafter "1980 RCRA Amendments"). Section 32 of the 1980 RCRA Amendments, codified at various parts of Subtitle D of RCRA, amended the statute in order to improve and augment federal programs for energy and resource recovery assistance to states and municipalities. Section 32 authorized the EPA to provide grants to states and municipalities in order to facilitate waste-to-energy feasibility and developmental planning, and to provide technical assistance in order to remove impediments to the development of energy recovery.

Thus, the 1976 and 1980 statutes demonstrate Congress' intent to regulate MSW separately from hazardous wastes. These statutes and their legislative history also show that a primary objective of Congress was to promote the development of resource recovery facilities, including facilities which recovered energy from the *incineration of* MSW.

B. The Household Waste Exclusion Expressly Exempts All Aspects of MSW Management from RCRA's Hazardous Waste Regulatory Program

Consistent with the resource recovery policies and MSW regulatory scheme embodied by Congress in RCRA, EPA promulgated the household waste exclusion rule in 1980. *See* 45 Fed. Reg. 33,084, 33,120 (May 19, 1980), and *see* App. A, *infra*. Responding in the regulation's pre-

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coal in terms of the British Thermal Unit value per pound each contain, as well as their respective ash content equivalents); 122 Cong. Rec. H1147, H1153 (Sept. 27, 1976) (statement of Rep. Myers) (RCRA represents a "major congressional commitment" to recapturing the discarding of "millions of tons of paper, valuable metals, glass, and other waste materials which could be reused *or burned* for their energy value.") (emphasis added).

amble to comments suggesting that portions of household wastes should be regulated as hazardous wastes because they might include solvents, insecticides, and paints purchased at grocery stores, EPA pointed to Congress' intent to exclude the entire household waste stream from regulation as a hazardous waste. Although EPA acknowledged that hazardous constituents may be included in household wastes, the agency nonetheless concluded that Congress' intent was best served by excluding the entire waste stream from Subtitle C regulations:

> The Senate language makes it clear that household waste does not lose the exclusion simply because it has been collected. Since household waste is excluded *in all phases of its management, residues remaining after treatment* (e.g., *incineration*, thermal treatment) are not subject to regulation as hazardous waste.

45 Fed. Reg. at 33,099 (emphasis added). Hence, as a category of waste household waste, including ash residue remaining after treatment, was explicitly exempted from regulation as a hazardous waste. The rationale for this exemption was not based on the *content* of household waste, but rather on the express congressional policy of exempting *the entire* household waste stream from the hazardous waste regulations regardless of whether it could be classified as a hazardous waste on account of the characteristics of its constituents. *See id.* at 33,097.

EPA knew when it promulgated the regulation that a small amount of hazardous waste would be included in the household waste stream. However, neither Congress nor EPA intended to omit any particular phase in the management of the MSW waste stream from the household waste exclusion. In particular, by describing incinerator ash as the residue left after "treatment" of the waste stream, and including the ash within the discussion of the waste stream's overall management, EPA unambig-

uously exempted the ash from regulation as a hazardous waste. Thus, EPA excluded the *entire* household waste stream "in all phases of its management" from RCRA's hazardous waste regulatory regime, regardless whether the treatment residue—ash—might meet the legal definition of "hazardous waste."

Discussing the hazardous waste regulatory scheme in the preamble to the regulation, EPA acknowledged that the system was imperfect.

> This system may not work perfectly for every waste however. *It may overregulate in some instances and underregulate in others.* This is an unavoidable consequence of attempting to develop a national hazardous waste management program which has to regulate thousands of wastes . . . .

Id. at 33,088-89 (emphasis added). Viewed in this context, the fact that MSW ash was not regulated as a hazardous waste is not surprising. EPA, in accordance with the policy choice made by Congress simply struck a balance in favor of underregulation in order to promote the important social values of providing local governments with flexibility in handling their MSW and of encouraging resource recovery.

When Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (hereinafter "1984 RCRA Amendments"), it took the unusual step of expressly adopting and clarifying EPA's interpretation of legislative intent by enacting the "Clarification of Household Waste Exclusion." [26] The provision codified in the statute the household waste exclusion as promulgated by EPA. It also clarified that the exclusion removed the entire household waste stream from the Subtitle C hazardous waste regulatory regime, and that it

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[26] *See* Section 223 of the 1984 RCRA Amendments, 98 Stat. 3252 (codified as amended at § 3001(i) of RCRA, 42 U.S.C. § 6921(i)).

applied to resource recovery facilities which burned and derived energy from MSW.

The intent behind the clarification is stated in the Senate report accompanying the Senate amendments to the original House bill, and agreed to by the conference committee.[27] Recognizing that it was important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation, the Senate report indicated new Section 3001(i) clarified Congress' original intent to include within the household waste exclusion all the activities of a resource recovery facility which recovered energy from the mass burning of household waste *and* non-hazardous waste from other sources, as long as the facility took precautions against accepting hazardous waste from commercial sources.

> *All waste management activities* of such a facility, including the *generation*, transportation, *treatment*, storage and *disposal* of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) are met. . . . If such [limitations] are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning of hazardous material.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).

This unambiguous statement by the Senate that all MSW waste management activities by a resource recovery facility are covered by the exclusion confirms that EPA correctly reflected Congress' intent when it promulgated the household waste exclusion rule. This Court has ruled that an administrative agency's interpretation of

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[27] *See* H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 106 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5677.

congressional intent is entitled to great weight, when Congress is aware of the agency's interpretation but fails to revise or repeal the interpretation in subsequent legislation. *See Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986); *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974); *Zuber v. Allen*, 396 U.S. 168, 192-3 (1964); *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U.S. 269, 273 (1933). Therefore, EPA's 1980 household waste exclusion rule, which expressly covered treatment residue—ash—was confirmed by the 1984 RCRA Amendments.[28]

By focusing on whether "management" and "generation" are coextensive terms, the Seventh Circuit missed what is really at issue in interpreting the household waste exclusion: the congressional intent *that this* particular waste stream *in all phases* of its management, which includes *treatment* by incineration *and disposal of* the ash residue resulting from such treatment, be excluded from the regulatory scheme under Subtitle C of RCRA. Instead of placing the statute within the context of the underlying regulatory and statutory policies, the Seventh Circuit seized upon the absence of the word "generation" from the language of Section 3001(i) to support

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[28] Both the Seventh Circuit below, 948 F.2d at 350, and the district court in *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. at 768-69, noted that since the 1984 RCRA Amendments, the executive branch has taken inconsistent positions on the meaning of the household waste exclusion, and therefore gave little or no deference to EPA's "see-sawing" post-1984 interpretations of the statute. EPA's latest approach to the problem has been to throw in the towel completely and seek legislative clarification of the exclusion. *See* Letter from Lee Thomas, Administrator, EPA, to Rep. James Florio (May 17, 1988); *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 33 (1989) (testimony of Sylvia Lowrance, Director EPA's Office of Solid Waste).

an interpretation which contradicted and defeated the purpose of the statute.

The Seventh Circuit's focus on the absence of the word "generation" in Section 3001(i) is misplaced. First, "generation" is expressly included within the scope of the exemption in the Senate report's discussion of Section 3001(i) which was agreed to by the conference committee. S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Second, the absence of the word "generation" in Section 3001(i) is irrelevant to whether the exemption extends to MSW ash. In producing ash, a resource recovery facility is not "generating" a new waste. Rather, it is *treating* pre-existing municipal solid waste to produce what EPA properly described as a "treatment residue" in the preamble to the 1980 household waste exclusion rule. Because Section 3001(i) expressly includes "treatment" within the scope of the exemption, the handling of the ash as a treatment residue also falls within the exemption.[29]

The Seventh Circuit's interpretation strips the statute of meaning by making the exemption no longer useful for the purpose it was intended to promote. By creating an economic disincentive to resource recovery, the Court of Appeals decision will in effect *discourage* the building of new resource recovery facilities which incinerate MSW as a means of energy recovery, and dissuade local governments from using existing facilities. The decision undermines Congress' intent in enacting the exclusion clarification, as well as Congress' underlying objectives with respect to the handling of MSW throughout the history of the RCRA legislation.

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[29] *See* Section 1004(34) of RCRA, 42 U.S.C. § 6903(34), which defines the term "treatment" when used in connection with a hazardous waste, to mean "any method, technique or process . . . designed to change the physical, chemical, or biological character or composition" of the waste.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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APPENDIX A

1. Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i).

> CLARIFICATION OF HOUSEHOLD WASTE EXCLUSION. A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—
>
> (1) such facility—
>
> (A) receives and burns only—
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources),
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous wastes identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

2. As originally promulgated, 45 Fed. Reg. 33,084, 33,120 (May 19, 1980) (codified as amended at 40 C.F.R. § 261.4(b)(1)), the Household Waste Exclusion stated:

> (b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:
>
> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or re-

used. "Household waste" means any waste material (including garbage, trash, and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels).